90-552

IN THE SUPREME COURT OF THE UNITED STATES

No._____

EDWARD HAROLD SCHAD, JR.

Petitioner,

v.

STATE OF ARIZONA

Respondent.

ORIGINAL

MOTION TO PROCEED IN FORMA PAUPERIS

Petitioner, Edward Harold Schad, Jr., a defendant under sentence of death, moves this Court to file the attached Petition for Writ of Certiorari without payment of costs and to proceed in forma pauperis. Petitioner's counsel has sent the attached affidavit of indigency to Petitioner but has not yet received the signed and notarized affidavit. For that reason, Petitioner requests an extension of time to file the signed and notarized affidavit. As the attached affidavit of counsel sets forth, Petitioner has had counsel appointed to represent him in all proceedings below and it is believed that he has no assets to pay these costs here. For these reasons, Petitioner requests that this Court allow him to proceed in forma pauperis.

Supreme Court, U.S.
FILED
Y-16-90
JOSEPH F. SPANIOL, JR.
CLERK

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SUPREME COURT, U.S.

SPECTFULLY SUBMITTED this 16th day of August, 1990.

John M. Bailey
Arizona Capital
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Arizona State University
College of Law
Tempe, Arizona 85287-0604
(602) 965-8185

Attorney for Petitioner

90-5551

AFFIDAVIT

ORIGINAL

:E OF ARIZONA)
) ss.
unty of Pinal)

I, EDWARD HAROLD SCHAD, JR., being first duly sworn, upon my oath, depose and state that I am the Petitioner in the above-entitled cause, that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear:

1. That I am not currently employed, nor have I been employed since I was incarcerated by the State of Arizona as a prisoner at the Arizona State Prison.

2. That within the last twelve months I have not received any income from any business, profession or self-employment, nor do I receive any interest, dividends, or other source of income.

3. That I have no checking or savings account and the only cash with which I am possessed is that which is within my prison account, which is of a minimal amount.

4. That I do not own any real estate, nor do I own any stocks, bonds, notes, automobiles, or other property of any value and I have no liquid assets whatsoever except as set forth in the preceding paragraph.

Supreme Court, U.S.
FILED
8-14-90
JOSEPH F. SPANIOL, JR.
CLERK

AUG 27 1990

That I have no one who is dependent upon me for support.

I understand that a false statement or answer to any of the questions in this affidavit will subject me to penalties for perjury.

Edward Harold Schad, Jr.
EDWARD HAROLD SCHAD, JR.

SUBSCRIBED AND SWORN to before me this 20th day of August, 1990.

Notary Public

My commission expires:
My Commission Expires March 29, 1993

90-5551

No. _____

ORIGINAL

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vs.

STATE OF ARIZONA,

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PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF ARIZONA

John M. Bailey
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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A CAPITAL CONVICTION OBTAINED WITHOUT PROVIDING FOR A UNANIMOUS, OR EVEN MAJORITY VOTE BY THE, JURY VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS?

II. WHETHER A STATE MAY AVOID A DEFENDANT'S EXERCISE OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER BECK V. ALABAMA BY DENYING THAT A NECESSARILY INCLUDED OFFENSE IS A "LESSER INCLUDED OFFENSE" UNDER STATE LAW?

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EDWARD HAROLD SCHAD, JR.

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PETITION FOR WRIT OF CERTIORARI

TO THE

SUPREME COURT OF THE STATE OF ARIZONA

The Petitioner, Edward Harold Schad, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Arizona entered on December 14, 1989.

OPINION BELOW

The opinion of the Arizona Supreme Court is not yet officially reported but is attached as Appendix "A" to this petition.

JURISDICTION

The judgment of the Supreme Court of Arizona affirming

Petitioner's conviction and sentence was entered on December 14, 1989. Petitioner filed a motion for reconsideration which was denied on April 17, 1990. See Order denying Petitioner's Motion for Reconsideration, attached as Appendix "B" to this petition. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257 (3) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> U.S. Const. amend. VI: In all criminal prosecution, the accused shall enjoy the the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed . . .
>
> U.S. Const. amend. VIII: Excessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishments inflicted.
>
> U.S. Const. amend. XIV: No state shall ... deprive any person of life, liberty, or property, without due process of law ...

STATEMENT OF THE CASE

On June 27, 1985, Petitioner was found guilty of first degree murder. At trial, the state presented evidence that on August 1, 1978[1], Larry Grove left Bisbee, Arizona en route to Washington. On August 9, 1978, Mr. Grove was found dead in Prescott, Arizona, as a result of strangulation. The Petitioner, when arrested several months later on unrelated charges, was in possession of several of

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[1]The Petitioner was originally tried, convicted, and sentenced to death in 1979. That conviction and sentence were subsequently set aside because the jury was instructed on felony murder without any definition of the elements of the underlying felony. State v. Schad, 142 Ariz. 619, 691 P.2d 710 (1984).

Mr. Grove's belongings[2]. While in custody on the unrelated charges, Petitioner stated to another inmate that he would "deny being in any area of Arizona or the State of Arizona, particularly Tempe, Arizona and Prescott, Arizona." This statement[3] was made without reference to date, context or purpose -- indeed, it was made before the petitioner was considered by anyone, including the fellow inmate questioning him, to be a suspect in this case.[4]

At the conclusion of petitioner's trial, the jury was instructed on premeditated and felony murder. See Appendix "C". Both premeditated and felony murder constitute first degree murder under Arizona law. A.R.S. Section 13-703. The jury was instructed on the elements of robbery as part of the felony murder instruction, but was not given a verdict form on robbery. The guilty verdict form returned by the jury did not specify whether the jury found Petitioner guilty of premeditated or felony murder or whether there was any agreement in the jury between the two. See Appendix "D".

After a one day sentencing hearing, the Petitioner was

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[2]These belongings included credit cards and a car.

[3]The Arizona Supreme Court labelled this statement as the "most incriminating" of the statements that petitioner made.

[4]No argument was made below that this nebulous statement and possession of a homicide victim's property was insufficient evidence to convict a person of first degree murder and sentence that person to death. This is unfortunate give the Arizona Supreme Court's most recent pronouncement on the subject. See State v. Mathers, __ Ariz. __, __ P.2d __, (slip opinion June 26, 1990) (conviction and death sentence set aside and judgment of acquittal entered by the Arizona Supreme Court based on insufficiency of the evidence).

sentenced to death. See Appendix "E".

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal issues that Petitioner raises in this petition concern fundamental constitutional rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. All of these issues were presented to the Arizona Supreme Court in Petitioner's appellate briefs challenging his conviction and death sentence. In a written opinion, the Arizona Supreme Court rejected those federal constitutional claims and affirmed the conviction and death sentence. See Appendix "A", pp. 11-13.

REASONS FOR GRANTING THE WRIT

I. THE JURY INSTRUCTION AND VERDICT FORM UTILIZED IN THE PETITIONER'S CONVICTION FOR FIRST DEGREE MURDER CONFLICT WITH THE LAW OF OTHER STATE AND FEDERAL JURISDICTIONS AND DENIED THE PETITIONER HIS RIGHT TO A UNANIMOUS VERDICT AND TO PROOF BEYOND A REASONABLE DOUBT OF ALL THE ELEMENTS OF THE OFFENSE.

In Arizona, a person is guilty of first degree murder if

> Intending or knowing that his conduct will cause death, such person causes the death of another with premeditation" or if "acting either alone or with one or more other persons, such person commits or attempts to commit sexual conduct with a minor ... sexual assault ... molestation of a child ... narcotics offenses ... kidnapping ... burglary ... arson ... robbery ... escape ... or child abuse ... and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person.
>
> A.R.S. Section 13-1105.B.

Homicide, as defined in subsection A, paragraph 2 of this section, requires no specific mental state other than what is required for

the commission of any of the enumerated felonies. First degree murder is punishable in Arizona by death or life imprisonment without the possibility of parole for either 25 or 35 years[5]. A.R.S. Section 13-703.

The Petitioner was indicted under both of the alternative theories of first degree murder. See Appendix "F". Within the confines of the scant inculpatory evidence presented against the petitioner, see infra, pp. 2-3, the prosecutor argued that the jury could find the petitioner guilty of first degree murder under either a premeditated or felony murder theory. See Appendix "G". The court likewise instructed the jury on both premeditated and felony murder. See Appendix "C". The court specifically told the jury that their verdict must be unanimous only as to guilt or innocence. The verdict form provided only that the jury found the petitioner guilty or not guilty of first degree murder. See Appendix "E".[6]

The Supreme Court of Arizona rejected the Petitioner's argument that submitting one verdict form on first degree murder, while instructing the jury on both premeditated murder and felony murder violated his constitutional right to a unanimous jury verdict. The court stated, "(i)n Arizona, first degree murder is only one crime regardless whether it occurs as a premeditated

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[5]This distinction is dependent upon the age of the victim.

[6]Although petitioner's trial counsel did not object to the verdict form, petitioner's appellate counsel raised the issue on appeal and the Supreme Court of Arizona decided it on the merits. See Appendix "A" pp. 12-13.

murder or a felony murder. Although a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed." Appendix "A" pp. 12-13 (citations omitted).

This line of reasoning by the Arizona courts is most fully illuminated in State v. Arnett, 158 Ariz. 15, 760 P.2d 1064 (1988). There the court stated, "[a]dmittedly, we do not know which of the three theories offered by the State the jury used to convict the defendant. The first theory was that the murder was premeditated and deliberate. The second was that the defendant had hid in the shed and was "lying in wait," and when the victim approached, he shot him. The third theory was that the defendant killed the victim in the course of a robbery. It is not necessary to know which of the three theories the jury relied upon in reaching its decision nor whether the jury relied on only one or more than one." Arnett, 760 P.2d at 1069.

This holding by the Arizona Supreme Court directly conflicts with the holdings of other federal and state jurisdictions that have reviewed this question and violates Petitioner's Sixth Amendment right to a jury trial and Fourteenth Amendment right to due process under the United States Constitution.

A. JURY UNANIMITY IN CAPITAL CASES IS REQUIRED UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS APPLIED TO THE STATES THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Contrary to the position taken by the Arizona Supreme Court

in Petitioner's case, juror unanimity in a capital case encompasses more than mere agreement on a verdict offering several means towards an end. Jurors must be in agreement as to the specific acts that a defendant committed to return a unanimous verdict.

Federal courts have long held that the jury must reach unanimity on the facts in issue, to convict a defendant. The first federal court of appeals to consider this issue[7] was United States v. Gipson, 553 F.2d 453 (5th Cir. 1977). Using this Court's opinion in In re Winship, 397 U.S. 358 (1970) for guidance, the court in Gipson reasoned that "[t]he unanimous jury requirement 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" Gipson, 553 F.2d at 457, quoting In re Winship, 397 U.S. at 364. The court went on to say that "(r)equiring the vote of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required." Gipson, 553 F.2d at 458.

Other courts, both federal and state, have found the reasoning of Gipson persuasive. See e.g. United States v. Beros, 833 F.2d 455 (3rd Cir. 1987) ("persuaded by the analysis and rationale" of Gipson, the court held that"[w]hen the government chooses to prosecute under an indictment advancing multiple theories, it must prove beyond a reasonable doubt at least one of the theories to the

[7]See Case Comment, Right To Jury Unanimity On Material Fact Issue: United States v. Gipson, 91 HARV.L.REV. 499 (1977).

satisfaction of the entire jury."); United States v. Payseno, 782 F.2d 832 (9th Cir. 1986) (general unanimity instruction is not sufficient when different theories of guilt are presented to jury, citing Gipson); State v. Boots, 308 Or. 371, 780 P.2d 725 (1989) (citing Gipson for authority in reversing defendant's capital murder conviction); Probst v. State, 547 A.2d 114 (Del. 1988) (holding "(t)he Sixth Amendment to the United States Constitution requires that there be a conviction by a jury that is unanimous as to the defendant's specific illegal action," citing Beros, supra); State v. Flynn, 14 Conn.App. 10, 539 A.2d 1005, cert. denied 109 S.Ct. 226 (1988) (Connecticut has adopted "holding and rationale" of Gipson) State v. Johnson, 46 Ohio St.3d 96, 545 N.E.2d 636 (1989), cert. denied 110 S.Ct. 1504 (1990) (quoting Gipson approvingly); and People v. Olsson, 56 Mich.App. 500, 224 N.W.2d 691 (1974) (defendant could not be convicted of first degree murder when alternative theories of premeditated murder and felony murder were presented to the jury and it was unclear whether jury agreed unanimously to either theory)[8].

Requiring juror unanimity on a single theory of first degree murder is necessary to effectuate the reasonable doubt standard enunciated by this Court in In re Winship, supra. It begs the question to say that premeditated and felony murder are merely

[8]But see People v. Fullwood, 51 Mich.App. 46, 215 N.W.2d 594 (1974), reh. den. 393 Mich. 785 (1975). As one commentator noted, these decisions cannot be reconciled. Trubitt, Patchwork Verdicts, Different-Jurors Verdicts, and American Jury Theory: Whether Verdicts Are Invalidated by Juror Disagreement on Issues, 36 OKLA.L.REV. 473, 551-552 (1983)

different methods of performing the same act. There are significant differences between an intentional murder and a murder that occurs during the commission of another felony. Indeed, the only common element of the two crimes is that someone died. Without juror agreement as to what specific acts a defendant performed, the reasonable doubt standard is emasculated.

In noncapital cases, this Court has held that although the Sixth Amendment requires a unanimous verdict in federal criminal trials, it does not in state criminal trials. Johnson v. Louisiana, 406 U.S. 356 (1972) and Apodaca v. Oregon, 406 U.S. 404 (1972). In reaching this conclusion, this Court specifically pointed out that in both Louisiana and Oregon, a defendant in a capital case would be entitled to a unanimous verdict. Johnson, 406 U.S. at 357, n.1 and Apodaca, 406 U.S. at 406, n.1.

This Court has never held that a less than unanimous verdict is constitutional in a capital case. Rather, it has held that capital cases require a heightened degree of reliability in the verdict. See, e.g. Beck v. Alabama, 447 U.S. 625, 638 (1980). Jury unanimity is essential to the heightened degree of reliability required in capital cases.

Moreover, unlike the state law on which this Court based its decisions in Johnson and Apodaca, Arizona law requires a unanimous jury verdict in all criminal cases. Ariz. Const. art. 2, Section 23 ("[i]n all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict."). Because Arizona has chosen to make jury unanimity a state constitutional right, it must

administer that right consistent with due process of law. Evitts v. Lucey, 469 U.S. 387 (1985) (when a state provides a right, it must administer that right in accord with due process). Arizona has failed to do so here. By authorizing a less than unanimous jury verdict in a first degree murder case charging alternatively premeditated and felony murder, Arizona provides less protection for the potential capital defendant than is afforded a defendant charged with the far less serious crime of negligent homicide. See A.R.S. Section 13-1102. This Court should grant certiorari to review the erroneous decision by the Arizona Supreme Court on this substantial and unsettled constitutional question. See, e.g. Williams v. Kaiser, 323 U.S. 471, (1945).

B. THE PETITIONER'S CONVICTION CANNOT STAND BECAUSE IT ALLOWS FOR A LESS THAN MAJORITY VOTE TO DECIDE GUILT OR INNOCENCE IN A CAPITAL CASE.

The Arizona Supreme Court's opinion in the Petitioner's case clearly permits a criminal defendant to be convicted when only six of the jurors agree as to what specific acts the defendant committed. The court's opinion in Arnett, supra, allows for conviction when only four jurors agree as to what specific acts the defendant committed. Given the various possibilities under A.R.S. Section 13-1105, supra, a defendant could be convicted of first degree murder in Arizona -- and sentenced to death -- when no more than two jurors agreed as to what specific acts the defendant

committed.[9]

Even if Johnson and Apodaca were applied to capital cases, the Arizona court decision here cannot stand. "While unanimity is not required, neither does it appear that a simple majority will satisfy the (S)ixth and (F)ourteenth (A)mendments. Especially when serious crimes are being tried ... it appears that a 'substantial majority' of the jury must vote to convict for a conviction to be obtained." United States Ex Rel Williams v. DeRoberts, 538 F.Supp 899 (N.D. Ill. 1982), rev'd on other grounds, 715 F.2d 1174 (7th Cir. 1984), cert. denied, 464 U.S. 1072 (1984) (reviewing a state conviction on habeas corpus) (citations omitted) (emphasis added). See Burch v. Louisiana, 441 U.S. 130 (1979); and Brown v. Louisiana, 447 U.S. 323, 331 (1980) ("(T)here do exist size and unanimity limits that cannot be transgressed if the essence of the jury trial is to be maintained.") Johnson approved a 9-3 verdict,

[9]Indeed, it unfortunately requires little imagination to hypothesize a case where the state charges both premeditated and felony murder and argues that the defendant kidnapped, robbed, and committed a sexual assault on the victim in the course of causing the death of the victim. Under this scenario, the defendant could be convicted of first degree murder with three jurors believing the defendant killed the victim after premeditation, but nine jurors believing he did not; three of the jurors who did not believe the defendant committed a premeditated murder, believing that the defendant did commit a sexual assault on the victim, but did not either rob or kidnap the victim; three of the remaining six jurors who did not believe that the defendant committed a premeditated murder, believing that the defendant did commit a robbery on the victim, but did not either kidnap or commit a sexual assault on the victim; and the last three jurors believing that the defendant kidnapped the victim, but did not rob or sexually assault the victim. In Arizona, this defendant could be sentenced to death without anything approaching even a majority consensus of what he did and did not do.

but expressed no opinion as to a lesser majority. Justice Blackmun, concurring, expressly stated his view that a 7-5 verdict would not pass constitutional muster. Johnson, 406 U.S. at 366 (Blackmun, J., concurring).

In Petitioner's case, Arizona strayed much further from jury unanimity than Apodaca and Johnson allow. Unlike the nine-juror consensus in Johnson, the six person "consensus" on which Petitioner could have been convicted simply does not ensure the degree of verdict reliability that the Sixth Amendment demands. Little evidence was adduced against the Petitioner at trial. The prosecutor argued both theories of first degree murder. The trial court instructed the jury on both theories of first degree murder, but provided only one verdict form for the jury to return their judgment as to the charge. Under these circumstances, it is impossible to know whether every essential element of either premeditated murder or felony murder was proven against the Petitioner. In re Winship, supra, 397 U.S. at 361. Our criminal justice system has always required more than mere jury agreement that a defendant is an evildoer for a conviction to withstand constitutional scrutiny. See, e.g. Lanzetta v. New Jersey, 306 U.S. 451 (1939) (statute criminalizing being a "gangster" violates due process). The Arizona Supreme Court's decision in Petitioner's case does not realize this standard.

The Arizona Supreme Court, along with various other state courts, has defended this result simply by stating that criminal defendants are not entitled to unanimity of jury verdict as to

manner in which the crime was committed as legal fact. See e.g. State v. Wilson, 220 Kan. 341, 552 P.2d 931, 935-936 (1976) ("When an accused is charged in one count of an information with both premeditated murder and felony murder it matters not whether some members of the jury arrive at a verdict of guilt based on proof of premeditation while others arrive at a verdict of guilt by reason of the killers malignant purpose."); State v. Ellison, 36 Wash.App. 564, 676 P.2d 531 (1984) (jury does not have to agree on theory as between premeditated and felony murder); Newsted v. State, 720 P.2d 734 (Okla.Crim.App.), cert. denied, 479 U.S. 995 (1986) (jury not required to choose unanimously between different theories of murder, citing Wilson, supra); State v. Tillman, 750 P.2d 546, 563 (Utah 1987) ("jurors in state court have ... to agree only on a defendant's guilt or innocence of the crime charged, not on a particular theory of that crime."); and People v. Adcox, 47 Cal.3d 207, 253 Cal.Rptr. 55, 763 P.2d 906 (1988), cert. denied, 110 S.Ct. 1500 (1990) (jurors not required to agree on theory as to first degree murder conviction). That assertion is not enough where it can result in a conviction based on a six-juror "consensus".

The two theories of Sixth Amendment jurisprudence exemplified by the groups of cases in the preceding paragraph and those following Gipson are obviously irreconcilable. Because of this obvious and direct conflict and because Arizona's holding on this issue in Petitioner's case violates the Sixth and Fourteenth Amendments, this Court should grant review and decide the issue.

II. THE MANDATE OF BECK V. ALABAMA CANNOT BE AVOIDED BY REFUSING TO ACKNOWLEDGE THE EXISTENCE OF A LESSER INCLUDED OFFENSE.

Under the Arizona definitions of robbery and felony murder, and the universally-accepted definition of a "lesser-included offense," robbery is a lesser-included offense of felony murder. On appeal to the Arizona Supreme Court, Petitioner argued that the trial court should have instructed the jury that it could find him guilty of robbery as a lesser-included offense of felony murder. Appendix "A" at 11. Such an instruction was required by the Eighth and Fourteenth Amendments. Beck v. Alabama, supra. The Arizona Supreme Court avoided this plain command of Beck by asserting, ipse dixit, that "in Arizona there is no lesser-included offense to felony murder." Appendix "A" at 12. (citations omitted). The issue raised is whether a State can render Beck v. Alabama meaningless simply by refusing to recognize the existence of lesser included offenses as a purported matter of state law.

Petitioner was convicted under the Arizona first degree murder statute, supra, pp. 4-5. In Petitioner's case, the underlying offense for the felony murder was robbery. Arizona defines robbery thus:

> A. A person commits robbery if in the course of taking any property of another from his person or immediate presence and against his will, such person threatens or uses force against any person with intent either to coerce surrender of property or to prevent resistance to such person taking or retaining property.

A.R.S. Section 13-1902. Theft, in turn, is a lesser-included offense of robbery under Arizona law. State v. Celaya, 135 Ariz. 248, 251-52, 660 P.2d 849, 852-53 (1983). The elements of theft

include the taking of another's property and specific intent to deprive the other of such property, but not the use or threat of force. Id., citing A.R.S. Section 13-1802. Under Arizona criminal procedure, a robbery instruction necessarily would have been accompanied by a theft instruction, provided that the evidence otherwise would have supported the giving of the instruction. Id. at 852, citing Rule 23.3, Rules of Criminal Procedure, 17 A.R.S.

In Petitioner's case, the Arizona Supreme Court acknowledged that "the evidence supported an instruction and conviction for robbery." Appendix "A" at 12. It bears repeating that the only substantial evidence against Petitioner in this case was his possession of the decedent's property. This evidence did not implicate Petitioner directly in the homicide. Petitioner could have found Mr. Graves' car and credit cards by the side of the road, and helped himself. This would have made Petitioner guilty of robbery if Mr. Graves was present, or theft if the car was unattended, but not homicide. Indeed, Petitioner's counsel argued to the jury that the evidence at most established that Petitioner had stolen Mr. Graves' property. See Appendix "H". But the jury had no option of convicting Petitioner of theft. Their only options were to convict the Petitioner of first degree murder or to find him not guilty.

Since the evidence here would have supported a verdict of robbery or theft, the remaining question under Beck v. Alabama is whether robbery is a lesser-included offense of felony murder in Arizona. If so, Beck required jury instructions that would have

permitted the jury to consider a verdict of guilt of the lesser-included non-capital offenses. Beck, 447 U.S. at 627.

The Court's analysis in Beck began with the common-law rule that a jury may find the defendant guilty of any lesser offense necessarily included in the offense charged. Beck, 447 U.S. at 633. The rule developed as an aid to the prosecution in cases where the prosecution could prove some, but not all, of the elements of the charged offense. See id., citing 2 C. Wright, Federal Practice and Procedure Section 515, n.54 (1969). An offense is lesser-included if it is impossible to commit the greater without also having committed the lesser. See 3 C. Wright, Federal Practice and Procedure Section 515. (2d ed. 1982). The Court held in Beck that Alabama's felony-murder crime was a lesser-included of that state's robbery-intentional killing crime, because the latter crime included all of the elements of the former plus for a culpable state of mind with respect to the killing. See, Beck, 447 U.S. at 627-28 and n.2.

The Court has applied the same view of lesser-included offenses in double jeopardy cases involving successive prosecutions. The Double Jeopardy Clause prohibits successive prosecutions for the "same" offense. Brown v. Ohio, 431 U.S. 161 (1977). In Brown, the Court decided that two crimes are the "same" if the lesser requires no proof different from that which is required for a conviction of the greater. Id. at 168. "The greater offense is therefore by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." Id.

Then, in Harris v. Oklahoma, 433 U.S. 682 (1977), the Court held that "[w]hen, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." Id. at 683 (footnote and citations omitted). In other words, Harris held that the murder conviction barred the later prosecution for robbery with firearms because robbery was a lesser-included offense of murder.

Under the foregoing principles, developed in the common-law and applied by this Court in Beck and elsewhere, robbery is a lesser-included offense of felony murder in Arizona. Where (as in Petitioner's case) the felony murder charge is based on an underlying felony of robbery, it is by definition impossible to commit felony murder without also having committed robbery. The elements of felony murder are by definition the same as the elements of robbery, with the additional element of causing the death of another person in the course of the robbery. See A.R.S. Section 13-1105.

The Arizona Supreme Court's contrary rule, that neither robbery nor any other crime is a lesser-included offense of felony murder, has never been satisfactorily explained. In some cases the Arizona court has said that the specific intent required for the underlying felony in a relony murder case supplies the mens rea necessary to satisfy the premeditation element of first degree murder. See, e.g. State v. LaGrand, 153 Ariz. 21, 734 P.2d 563 (1987). This does not explain why the underlying felony is not a

lesser-included offense where the parties dispute whether the defendant caused a death in the course of the felony. In another case the Arizona court stated the "no lessers" rule and cited United States v. Garrett, 471 U.S. 773 (1985). State v. Leslie, 147 Ariz. 38, 48, 708 P.2d 719, 729 (1985). But Garrett, which held that drug importation and "continuing criminal enterprise" are not the same crime for double jeopardy purposes, lends no apparent support to the court's position either.

Arizona's treatment of the Beck rule eviscerates it. To avoid Beck, a state need only to deny the existence of lesser-included offenses. The Ninth Circuit has upheld this approach, rejecting a Beck claim with a bare reference to Arizona's "no lessers" rule. Woratzeck v. Ricketts, 820 F.2d 1450 (9th Cir. 1987), vacated on other grounds, 486 U.S. 1051 (1988). At least one state high court, on the other hand, has recognized that the state cannot invoke state law to avoid giving an lesser-included instruction that Beck would otherwise require. See Hook v. State, 315 Md. 25, 555 A.2d 233 (1989) (prosecutor prohibited from entering a nolle prosequi on second degree murder in the middle of the trial, over the defendant's objection).[10]

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[10]Spaziano v. Florida, 468 U.S. 447 (1984) supports the analysis in Hook, and also Petitioner's position here. The Court held in Spaziano that the defendant was not entitled to the benefit of both a lesser-included offense instruction and an expired period of limitations on the lesser offenses. Id. at 454. Seven members of the Court agreed that the Constitution required the state to give the defendant the option of waiving the state-law statute of limitations, so that the jury could be instructed on the lesser-included offenses. See id. at 456-57; id. at 490 (Stevens, J., concurring in part and dissenting in part); id. at 467 (White, J., concurring in part and concurring in the judgment). Moreover, even

To prevent the demise of Beck v. Alabama, the Court must grant this petition for writ of certiorari and reverse the judgment of the Arizona Supreme Court.

CONCLUSION

The Arizona Supreme Court's holding that the Petitioner may be convicted and sentenced to death without a unanimous, or even majority, vote as to what specific acts he committed conflicts directly with the rules in other state and federal jurisdictions and violates the Petitioner's rights under the Sixth and Fourteenth Amendments. The Arizona Supreme Court's holding that the Petitioner was not entitled to have the jury consider whether he committed the lesser offenses of robbery or theft violates the Petitioner's Eighth and Fourteenth Amendment rights and this Court's holding in Beck v. Alabama. The writ of certiorari should, therefore, be granted.

Respectfully submitted,

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August 16, 1990

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if Spaziano had allowed the state to enforce its statute of limitations to avoid lesser-included offenses, it would be quite another thing to allow a state to achieve the same result by redefining the very concept of a lesser-included offense.

FILED
DEC 14 1989
SUPREME COURT

IN THE SUPREME COURT OF ARIZONA
En Banc

STATE OF ARIZONA, Appellee, v. EDWARD HAROLD SCHAD, JR., Appellant.	Supreme Court No. 4876-3 Yavapai County Superior Court No. 8752 O P I N I O N 12-18-89

Appeal from the Superior Court of Yavapai County

The Honorable Richard Anderson, Judge

AFFIRMED

Robert K. Corbin, Attorney General
by Jessica Funkhouser, Chief Counsel
Criminal Division
R. Wayne Ford, Assistant Attorney General
Attorneys for Appellee — Phoenix

S. Alan Cook, P.C.
by S. Alan Cook
Attorney for Appellant — Phoenix

HOLOHAN, Justice (Retired)

The defendant, Edward Harold Schad, Jr., was convicted by a Yavapai County jury of first degree murder and sentenced to death. State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981), cert. denied, 455 U.S. 983, 102 S. Ct. 1492, 71 L. Ed. 2d 693 (1982). On the defendant's petition for post-conviction relief, this

court reversed the conviction, holding that the trial court committed fundamental error by instructing the jury on felony murder without defining the elements of the underlying felony. State v. Schad, 142 Ariz. 619, 691 P.2d 710 (1984). On remand, the defendant was again convicted of first degree murder and sentenced to death. This appeal followed. We have jurisdiction pursuant to A.R.S. § 13-4031.

The facts of this case are fully set forth in our 1981 opinion, supra. Briefly summarized, the following facts led to the defendant's conviction in the second trial.

The victim, Lorimer "Leroy" Grove, was last seen alive on August 1, 1978, when he left Bisbee, Arizona for Everett, Washington in his new Cadillac. His body was discovered August 9, 1978, off the highway just south of Prescott. The corpse was not identified until October 11, 1978, after the defendant's arrest. The killer had strangled the victim to death with a small rope tied around his neck.

The defendant's connection with the homicide is established only by circumstantial evidence. Beginning with the day after the victim left Bisbee, the defendant made numerous purchases with the victim's credit cards. The police recovered credit cards from the defendant's wallet after his arrest. The state also introduced a forged check drawn on the victim's bank account and made to the defendant's order for "wages." A car the defendant had rented, but never returned, was discovered in

Flagstaff in early August, 1978. Discovered in this car was a "unique mirror contraption" designed and built by the victim. On September 3, 1978, New York authorities issued the defendant a speeding ticket for an offense he committed while driving the victim's Cadillac. The defendant explained to the citing officer that the car belonged to his friend Leroy Grove. Later in September, the defendant drove the Cadillac to Salt Lake City, Utah. While he was in Utah, the Salt Lake City police arrested the defendant for investigation of a possible parole violation and possession of a stolen vehicle. During his incarceration in the Salt Lake City jail, the defendant spoke with John Duncan[1] and made several inculpatory statements. Thereafter, a Yavapai County Grand Jury indicted the defendant for the murder of Lorimer Grove and the authorities extradited the defendant to Arizona to stand trial.

The defendant raises the following issues for our consideration:

> 1. Did admitting statements that the defendant made to John Duncan in the Salt Lake City jail violate the defendant's constitutional rights?
>
> 2. Was the defendant denied a fair trial when the state failed to preserve the victim's clothing and preserve fingerprint impressions on items found with the body and on the mirror contraption?
>
> 3. Did the trial court commit error by failing to instruct the jury on, and provide a form of verdict for, the lesser-included offense of robbery?

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[1] Duncan had been staying with the defendant's girlfriend when the defendant arrived in Salt Lake City.

4. Did the trial court err when it refused to give forms of verdict for both premeditated murder and felony murder?

5. Was it proper to use the defendant's prior murder conviction as an aggravating factor?

6. Were the defendant's double jeopardy rights violated when two aggravating factors were found based on a single prior conviction?

7. Were the defendant's rights violated when the trial court found that the the defendant committed the murder for pecuniary gain?

8. Did the court fail to properly weigh the mitigating circumstances?

9. Did the defendant's "inability" to "voir dire" the trial judge deprive him of a fair trial?

10. Is Arizona's statutory death sentencing scheme unconstitutional?

In addition to addressing the issues raised by the defendant, we independently review the aggravating and mitigating circumstances found by the trial judge, determine whether the defendant's sentence is proportional to similar cases, and search the record for fundamental error.

THE STATEMENTS

At the defendant's second trial, as in the first trial, the court permitted the state to present testimony by John Duncan concerning statements the defendant made to him when he visited the defendant in the Salt Lake City jail. The defendant's most incriminating statement was that he would "deny being in any area of Arizona or the State of Arizona, particularly Tempe, Arizona and Prescott, Arizona."

This court reviewed the circumstances surrounding Duncan's testimony in our 1981 opinion in light of Massiah v. United States, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964), and United States v. Henry, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980). Schad, 129 Ariz. at 565, 633 P.2d at 374. We found that Duncan and the Utah authorities had no agency relationship, that the police did not actively or deliberately solicit Duncan's assistance and that the evidence obtained was insignificant. Therefore, we concluded that the trial court properly denied the defendant's motion to suppress the statement. Schad, 129 Ariz. at 566, 633 P.2d at 375. Nevertheless, the defendant's counsel again moved to suppress the statements prior to the second trial because new evidence allegedly justified a rehearing and established grounds for suppressing the testimony at the new trial. This new evidence consisted of:

1. Testimony from Sergeant Judd of the Coconino County Sheriff's office that Detective Halterman described Duncan as an "informant" and a "confidential informant."

2. Testimony that Detective Halterman had asked Duncan if he would be willing to visit the defendant in jail and arranged the visit for a Monday. Monday was not a normal visiting day, so Duncan could not have made the visit without special arrangements.

3. Detective Halterman arranged for Duncan's release pending extradition.

Despite this "new evidence," the trial court again denied the defendant's motion to suppress. The judge concluded

that the use of the word "informant" by Detective Halterman was a matter of semantics rather than of substance. In his ruling the judge stated:

> The Halterman testimony was rather clear, was extremely clear and unequivocal relative to the witness Duncan's not being, term of art, a confidential informant. The way we come up with the language confidential information and informant in this particular case is from Lieutenant Judd from his police report ... but of course as you know, Lieutenant Judd had no facts upon which to base a conclusion that ... Mr. Duncan might be what we have come to know as the confidential informant.

R.T. Vol. VI, p. 815.

Halterman denied suggesting a visit with the defendant. In fact, Duncan testified it was his idea. R.T. Vol. VI, pp. 672 and 809. The record is less clear on who arranged the visit. Duncan stated that he thought that Detective Halterman or someone from the police department arranged his visit. Id. at 804. Nevertheless, the evidence established that the police did not tell Duncan to visit Schad or what questions he should ask. Furthermore, the homicide investigation had yet to focus on Schad because Detective Halterman did not learn that the owner of the Cadillac was dead until a month after Duncan's visit. Id. at 666, 803. Finally, Duncan's release pending extradition was arranged prior to the Schad case coming to light for reasons separate and apart from Duncan's subsequent assistance in this case.

It is unnecessary to review the relevant case law. We

do not find the defendant's evidence any more compelling than the last time. The record supports the judge's ruling. We find no error in denying the defendant's motion to suppress.

PRESERVATION OF EVIDENCE

The state did not (1) preserve the victim's clothing; (2) fingerprint items found with the body; or (3) fingerprint the mirror device found in the defendant's abandoned rental car. The trial court did give a Willits instruction.[2] State v. Willits, 96 Ariz. 184, 393 P.2d 274 (1964). Despite this instruction, the defendant argues that the state's failure to process these items, especially the mirror, deprived the defendant of exculpatory evidence in violation of his due process right to a fair trial. The defendant contends that had these items been processed, he could have proved that someone else committed the crime.

The state counters that the defendant is barred from relief because he failed to raise this issue at the first trial. The only case cited by the state is inapposite because it concerns waiver of issues by failure to object at trial. Although the defendant did not raise this issue until the second trial, we find that his pretrial motions properly preserved this issue for

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[2] The jury was instructed:

> If you find that the plaintiff, the State of Arizona, has destroyed, caused to be destroyed or allowed to be destroyed any evidence whose contents or quality is in issue, you may infer that the true fact is against their interest.

review.

The "substantive" issue raised is whether the state had a duty to preserve the victim's clothing,[3] and to collect and process fingerprints from the mirror and other objects. The defendant argues that the state's failure to collect and preserve potentially exculpatory evidence requires reversal of the conviction and dismissal of the charges. See California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); State v. Mitchell, 140 Ariz. 551, 683 P.2d 750 (App. 1984).

In Trombetta, the U.S. Supreme Court held that the due process clause of the 14th Amendment does not require the state to preserve breath samples in order to introduce the results of breath-analysis tests at a DUI trial. 467 U.S. at 491, 104 S. Ct. at 2535, 81 L. Ed. 2d at 423. Under the Federal Constitution, the state's duty to preserve evidence is "limited to evidence that might be expected to play a significant role in the suspect's defense." Id. at 488, 104 S. Ct. at 2534, 81 L. Ed. 2d at 422. This materiality test requires that the evidence (1) possess an exculpatory value that was apparent before the evidence was destroyed and (2) be such that the defendant would be unable to obtain comparable evidence by other reasonable means. Id. at 489, 104 S. Ct. at 2534, 81 L. Ed. 2d at 422. The

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[3] It should be noted that the state's expert testified that the victim's clothes were forensically useless due to the advanced state of decomposition.

Court concluded that "the chances are extremely low that preserved [breath] samples would have been exculpatory." Id.

Recently, we held that a Willits instruction adequately protects a defendant's due process rights where the state has destroyed or failed to preserve evidence unless the defendant is prejudiced or the state acted in bad faith. State v. Tucker, 157 Ariz. 433, 442-43, 759 P.2d 579, 588-89 (1988). Tucker held that the partial latent fingerprints destroyed by the state "had some forensic value in excluding the defendant from having left the prints," but "could not have excluded Tucker from having handled the gun, and certainly could not have excluded him from committing the crime." Id. at 442, 759 P.2d at 588. Thus, we concluded that a Willits instruction adequately protected the defendant's rights. Cf. State v. Hannah, 120 Ariz. 1, 583 P.2d 888 (1978) (where the only items connecting the defendant to the crime were destroyed, we found that the defendant had been so seriously prejudiced by the loss of the evidence that he could not receive a fair trial).

The state concedes that any recoverable fingerprints which may have existed were probably destroyed in the defendant's first trial. The state urges us to consider that the defendant had ample opportunity to analyze the mirror before the prints were destroyed and that defense counsel participated in their destruction. It may well be that the defendant's counsel participated in the destruction of evidence. However, the duty to

preserve evidence remains with the state and nothing in the record shows the defendant or his counsel solely responsible or more culpable than the state for the loss.

Nevertheless, we find that the Willits instruction adequately protected the defendant's rights. Unlike Hannah, the mirror was not the only piece of evidence linking the defendant with the crime. The defendant was arrested in possession of the victim's credit cards and car. He told the New York patrolman that he was driving the car for the victim. Furthermore, as we found in Tucker, a Willits instruction adequately addressed the loss of the fingerprint evidence.

> The best possible scenario for Tucker is that an examination of the partial latent prints would have excluded him from the set of persons whose prints were on the gun. However, as stated above, such an exclusion would not have excluded Tucker from ever having handled the gun and certainly would not exonerate Tucker of the alleged crime. As Tucker's expert explained, Tucker could have touched the gun, but not left a print, or the print could have been easily wiped off either intentionally or unintentionally through subsequent handling. We find no reasonable possibility that defendant was prejudiced by the destruction of the partial latent prints. [Citations omitted.]
>
> Moreover, under the Willits instruction, the jury could infer exactly what the destroyed evidence, at best, could have proved--that Tucker's prints were not on the gun. Under these circumstances, where the destroyed evidence would not exonerate Tucker, and where the Willits instruction provided the same benefit as any independent examination of the evidence, the Willits instruction protected Tucker's right to a fair trial.

Tucker, 157 Ariz. at 443, 759 P.2d at 589.

Similarly, in the present case, the best that the defendant could hope for is that none of his fingerprints were on the mirror, clothing or other items. While this would have excluded the defendant from the set of persons whose prints were on these items, it would not have excluded the defendant from ever having handled any of these objects, nor would it have exonerated him of the alleged crime. The Willits instruction accomplished the most that the defendant could have proved--that his prints were not on these items. We find that the defendant's rights were adequately protected.

FAILURE TO GIVE ROBBERY INSTRUCTION OR FORM OF VERDICT

Here the defendant contests the trial court's failure to give a lesser included offense instruction or to provide a form of verdict for robbery. Defendant argues that Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), requires a robbery instruction and form of verdict because: (1) the evidence supported a conviction for the offense of robbery; and (2) the robbery is a lesser-included offense of the felony murder because it was the underlying felony.

Although the defendant concedes that he did not request such an instruction or verdict form, he argues that it was fundamental error. He also maintains that counsel ineffectively assisted him in failing to request such instructions. In an Arizona capital case, the trial court must instruct on all lesser-included offenses supported by the evidence. Failure to

do so, with or without a request, constitutes fundamental error. State v. Whittle, 156 Ariz. 405, 407, 752 P.2d 494, 496 (1988). However, in Arizona there is no lesser-included offense to felony murder. State v. LaGrand, 153 Ariz. 21, 30, 734 P.2d 563, 572, cert. denied, 484 U.S. 872, 108 S. Ct. 207, 98 L. Ed. 2d 158 (1987); see also State v. Leslie, 147 Ariz. 38, 48, 708 P.2d 719, 729 (1985); State v. Martinez-Villareal, 145 Ariz. 441, 446-47, 702 P.2d 670, 675-76, cert. denied, 474 U.S. 975, 106 S. Ct. 339, 88 L. Ed. 2d 324 (1985). Although we agree with the defendant that the evidence supported an instruction and conviction for robbery, we disagree that the underlying felony supporting a felony murder conviction requires a lesser-included offense instruction and form of verdict. LaGrand, 153 Ariz. at 30, 734 P.2d at 572. His attorney's failure to request one was not ineffective assistance of counsel.

SINGLE VERDICT FORM FOR FIRST DEGREE MURDER

The defendant next argues that the trial court erred when it submitted to the jury one verdict form for the crime of first-degree murder while instructing them that the crime could be committed in either of two ways--by premeditation or by the commission of a felony. The defendant's arguments on this issue have all been previously decided by this Court and rejected. In State v. Encinas, 132 Ariz. 493, 647 P.2d 624 (1982), we stated:

> In Arizona, first degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder. See State v. Axley, 132 Ariz. 383, 646 P.2d 268 (1982). Although a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, State v. Counterman, 8 Ariz. App. 526, 448 P.2d 96 (1968), the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed.

Id. at 496, 647 P.2d at 627.

Our decision in State v. Smith, ___ Ariz. ___, 774 P.2d 811 (1989), did not change the substantive rule that it was not error to have one form of verdict for first degree murder even though both premeditation and felony murder were being submitted to the jury. Smith does, however, strongly urge that alternate forms of verdict be submitted to a jury when a case is submitted on alternative theories of premeditated and felony murder. Id. at ___, 774 P.2d at 811.

SENTENCE

In the special verdict on the sentence, the trial court found the existence of three statutory aggravating circumstances: previous conviction of an offense for which a sentence of life imprisonment was possible, previous conviction for a crime involving violence, and commission of the murder for pecuniary gain. The trial court found several mitigating factors, but concluded that they were not sufficiently substantial to call for leniency. The trial court specifically found that the total mitigation was not sufficient to overcome any one of the aggravating circumstances. R.T. August 29, 1985, p. 10. As a result of the court's findings, the defendant was sentenced to death.

THE PRIOR CONVICTION

The defendant's 1968 conviction in the State of Utah for second degree murder was found by the trial court to constitute two aggravating circumstances set out in former A.R.S. § 13-454(E)(1) and (E)(2) (now A.R.S. § 13-703(F)(1) and (F)(2)).[4] The defendant attacks the trial court's use of these factors to enhance the penalty to death because: (1) society no longer recognizes sodomy as a felony; (2) there is no crime of felony second-degree murder in Arizona; (3) the present Arizona sodomy statute is unconstitutional; (4) former § 13-454(E)(2) (now § 13-703(F)(2)) is not applicable because the Utah offense did not involve violence; and, (5) the Utah conviction is invalid in light of Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982).

The defendant's conviction of second degree murder occurred in connection with mutual acts of sodomy. The victim

[4]The current version of the statute provides in relevant part:

> F. Aggravating circumstances to be considered shall be the following:
>
> 1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.
>
> 2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

was found in a closet with his hands and feet bound and two pieces of cloth around his neck. Apparently, the cloth was tied around the victim's neck for the purpose of restricting the flow of blood to the brain in order to heighten erotic stimulus--a practice known as auto-erotic asphyxiation. In 1968 sodomy was a felony in both Utah and Arizona.[5]

The main thrust of the defendant's argument is that the changes in the criminal code, reducing the punishment for sodomy to a misdemeanor and the elimination of the offense of second degree felony murder, require that the defendant's Utah conviction not be considered an aggravating circumstance for sentencing. The defendant's argument seeks not only to have us ignore the requirement that we consider the penalty imposable at the time of the conviction, but it mischaracterizes the nature of the defendant's Utah conviction.

In considering a prior offense for sentencing purposes, a court looks at the penalty in effect under Arizona law at the time the defendant was sentenced for the prior offense, not the penalty for the prior offense at the time of sentencing for a subsequent conviction. State v. Tittle, 147 Ariz. 339, 710 P.2d 449 (1985). The defendant concedes that pursuant to former A.R.S. §§ 13-453(B) and -1644, the maximum penalty for second-degree murder in 1968 was life imprisonment. See State v.

[5] The current Arizona statute, in effect since 1978, provides that sodomy is a misdemeanor. A.R.S. § 13-1411.

Williams, 103 Ariz. 284, 440 P.2d 311 (1968). However, the defendant contends that aggravating his sentence under these circumstances would violate his constitutional rights.

Contrary to the contention implicit in defendant's argument, the prior conviction in Utah was not merely for committing sodomy. The defendant was found guilty of committing a dangerous act while engaging in sodomy. The Utah Supreme Court specifically found that sodomy performed while engaging in auto-erotic asphyxiation constituted a dangerous felony. See State v. Schad, 24 Utah 2d 255, 470 P.2d 246 (1970).

> It is so obvious as not to require elucidation that the act of sodomy committed in the manner shown here, with the deceased so bound that he choked to death, was an act "greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life."

Id. at 261, 470 P.2d at 250 (emphasis added).

The defendant's second degree murder conviction in Utah was not based on the mere act of sodomy but the manner in which it was performed. Schad, 24 Utah 2d at 261, 470 P.2d at 250. Irrespective of the debate concerning the constitutionality of statutes prohibiting consensual sodomy,[6] it is clear that a state may lawfully punish a person for engaging in conduct exhibiting a knowing or reckless disregard for human life. See A.R.S.

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6 Both the United States Supreme Court and this court have held that a state may lawfully prohibit consensual sodomy. Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986); State v. Bateman, 113 Ariz. 107, 547 P.2d 6, cert. denied, 429 U.S. 864, 97 S. Ct. 170, 50 L. Ed. 2d 143 (1976).

§§ 13-1103(A)(1), -1104(A)(3). This is the crux of the defendant's Utah conviction. Under similar circumstances the defendant's conduct would have constituted second degree murder in Arizona.

CONVICTION FOR FELONY INVOLVING VIOLENCE

The defendant argues that his previous conviction for second degree murder did not involve "violence" within the meaning of A.R.S. § 13-703(F)(2). He argues that the death was an "accident" involving no physical force because he and the victim were consenting homosexual partners. To support this argument, the defendant points to the medical examiner's reports, admitted at the Utah sentencing, stating that the victim had likely tied himself up to heighten his pleasure.

The state argues that murder is inherently a violent crime, and cannot occur absent some type of violence to the victim. Tittle, 147 Ariz. at 345, 710 P.2d at 455 (robbery is inherently violent, and so satisfies § 13-703(F)(2)).

It is not necessary for us to resolve this issue, because the trial judge, in his special findings, found that the total mitigation present was "not sufficient to overcome any one of the aggravating circumstances." Transcript of Sentencing, August 29, 1985, p. 10. Any one of the other aggravating factors would be sufficient to support the sentence.

TWO AGGRAVATING FACTORS ARISING FROM SINGLE PRIOR CONVICTION

The defendant claims that the use of a single prior conviction as the basis for two aggravating factors violates his

double jeopardy rights. Therefore, he argues, we should strike at least one of the aggravating factors.

So long as the trial court weighed the aggravating circumstances arising out of the 1968 murder only once, the defendant's rights have not been infringed. Tittle, 147 Ariz. at 345, 710 P.2d at 455. Here the trial judge found that the totality of the mitigating circumstances was insufficient to overcome even a single aggravating factor. Hence, it did not matter that the trial court found two aggravating factors arising from his prior conviction since one was enough to impose the death penalty.

FINDING THAT MURDER WAS COMMITTED FOR PECUNIARY GAIN

The defendant claims that the trial court violated his rights when it found that he murdered for pecuniary gain. Former A.R.S. § 13-454(E)(5) (now A.R.S. § 13-703(F)(5)). The defendant contends that the pecuniary gain aggravating factor (1) is unconstitutionally vague, (2) was unconstitutionally applied ex post facto, (3) violates double jeopardy, and (4) was not proved beyond a reasonable doubt.

A. Vagueness

The defendant argues that the pecuniary gain factor is vague because it fails to distinguish between a killer for hire and a "routine" felony (e.g. burglary or robbery) where a death occurs. Therefore, a person of average intelligence will not understand that his act is a capital crime. See State v. Bate-

man, 113 Ariz. 107, 109, 547 P.2d 6, 8, cert. denied, 429 U.S. 864, 97 S. Ct. 170, 50 L. Ed. 2d 32 (1976). We have rejected this contention in an earlier case and find no reason to hold otherwise. State v. Nash, 143 Ariz. 392, 400, 694 P.2d 222, 230, cert. denied, 471 U.S. 1143, 105 S. Ct. 2689, 86 L. Ed. 2d 706 (1985).

B. Ex Post Facto

In 1980, this court held for the first time that the pecuniary gain aggravating factor was not limited to contract killers. State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 612 (1980). The defendant argues that application of Clark to him constitutes ex post facto enlargement of the penalty for murder motivated by pecuniary gain when his offense occurred before the Clark decision.

A judicial decision is not subject to the constitutional bar against ex post facto legislation. United States v. Walsh, 770 F.2d 1490, 1492 (9th Cir. 1985). However, a defendant's due process rights are violated when an unforeseeable judicial decision enlarging the scope of a criminal statute is applied retroactively to cover behavior not considered unlawful in the past. Bouie v. City of Columbia, 378 U.S. 347, 353-54, 84 S. Ct. 1697, 1702-03, 12 L. Ed. 2d 894, 899-900 (1964).

In the present case, the defendant misinterprets Clark. That opinion did not hold that former A.R.S. § 13-454(E)(5)

excluded non-contract/hired-killer situations prior to Clark. Clark merely rejected the argument that the factor of pecuniary gain was restricted to "hired guns." The Clark opinion did not create substantive law, it merely recognized the pre-existing scope of present law. It was not an unforeseeable enlargement nor did it suddenly make lawful conduct unlawful. As in Clark, finding that the defendant committed this crime for pecuniary gain is not a violation of the defendant's due process rights.

C. Double Jeopardy

The defendant also claims violation of his right against double jeopardy. He reasons that use of a general verdict form prevents the court from ascertaining whether the conviction was based on a finding of premeditation or felony murder. The defendant speculates that if premeditation were the basis of the jury's conviction, then the double jeopardy clause would bar pecuniary gain as an aggravating factor since the jury must have "acquitted" him of robbery. Therefore, since it is impossible to determine which type of first degree murder defendant is guilty of, but only that he is guilty of first degree murder, the state failed to prove pecuniary gain beyond a reasonable doubt. State v. Richmond, 136 Ariz. 312, 322, 666 P.2d 57, 67, cert. denied, 464 U.S. 986, 104 S. Ct. 435, 78 L. Ed. 2d 367 (1983); A.R.S. § 13-703(C).

Whether the jury "acquitted" the defendant of robbery is irrelevant. The double jeopardy clause protects against a second

prosecution for the same offense after acquittal or conviction, and protects against multiple punishments for the same offense. State v. Seats, 131 Ariz. 89, 638 P.2d 1335 (1981). Pecuniary gain is not the same offense as robbery. See A.R.S. § 13-1902. It is an aggravating factor for determining a defendant's sentence in a capital case. In State v. Carriger, 143 Ariz. 142, 161, 692 P.2d 991, 1010 (1984), cert. denied, 471 U.S. 1111, 105 S. Ct. 2347, 85 L. Ed. 2d 864 (1985), we stated:

> To prove robbery, the state must show a taking of property from the victim, see A.R.S. § 13-1902(A); to prove pecuniary gain, the state must show the actor's motivation was the expectation of pecuniary gain, see A.R.S. § 13-703(F)(5). Proving a taking in a robbery does not necessarily prove the motivation for a murder, and the state cannot be said to be using one fact to prove two different items.

(Emphasis in original.) Even if we were to assume that the jury specifically found that no robbery occurred, double jeopardy does not prevent the trial judge from finding that the defendant's motivation for killing the victim was the expectation of pecuniary gain.

D. Sufficiency of Evidence

The defendant finally contends that there was insufficient evidence to show the murder was committed for pecuniary gain. He claims that the only evidence suggesting he killed the victim for pecuniary gain was circumstantial and that the act may well have been an afterthought.

Prior to encountering the victim, the defendant was

driving a stolen car. He abandoned that car and took the victim's car. He also left the murder scene with the victim's wallet, money, credit cards and ring. This provides strong circumstantial evidence that the purpose of the murder was pecuniary gain. Clark, 126 Ariz. at 436, 616 P.2d at 896. The evidence strongly supports the finding by the trial judge that the aggravating circumstance of pecuniary gain existed in this case.

MITIGATING FACTORS

The defendant next argues that the trial court erred by failing to consider the defendant's potential for rehabilitation and the circumstances of the Utah murder. A.R.S. § 13-703(E) requires that the trial court "take into account the . . . mitigating circumstances" and then determine whether those circumstances are "sufficiently substantial to call for leniency." Mitigating circumstances include "any factors . . . which are relevant in determining whether to impose a sentence less than death. . . ." A.R.S. § 13-703(G).

Contrary to the defendant's claim, the trial court did find and consider the defendant's potential for rehabilitation. Nevertheless, the trial court found this to be insufficient to overcome any of the aggravating factors. We also reject the defendant's claim that the circumstances surrounding his prior murder conviction should be considered as a mitigating circumstance because the victim experienced "a pleasurable erotic

experience" before he died. While it is clear that the Utah murder did not display the depravity present in the case at bar, the trial court did not find the circumstances of the earlier murder to be mitigating and neither do we.

As is required at this point, we conduct our own independent examination of the record to determine whether the death penalty is properly imposed. State v. Vickers, 129 Ariz. 506, 516, 633 P.2d 315, 325 (1981). We note, however, that in 1981 we considered and affirmed the defendant's death penalty. State v. Schad, 129 Ariz. 557, 633 P.2d 366 (1981), cert. denied, 455 U.S. 983, 102 S. Ct. 1492, 71 L. Ed. 2d 693 (1982).

Our review of the record satisfies us that the state proved that the defendant committed the murder for pecuniary gain. The state also properly established an additional aggravating circumstance arising out of the defendant's prior murder conviction. Thus, we find, without question, that there were at least two aggravating circumstances in the present case.

We also conclude that the mitigating circumstances are insufficient to outweigh a single aggravating factor. Although the defendant has continued to show exemplary behavior while incarcerated, we do not find this to be sufficiently substantial to call for leniency. The evidence shows that the defendant strangled to death a 74-year-old man in order to obtain his vehicle and money. At the time the defendant committed this act, he had previously been found criminally responsible for another

person's death. The death penalty is appropriate in this case.

VOIR DIRE EXAMINATION OF TRIAL JUDGE

The defendant next contends that lack of an opportunity to examine the trial/sentencing judge for bias and/or prejudice in a capital case violated his rights to due process and a fair trial. The defendant argues that voir dire examination of potential jurors is a constitutional requirement of a fair trial and should similarly apply in a capital sentencing case where the trial judge sits as a fact-finder.

We recently addressed this issue in State v. Fulminante, 11 Ariz. Adv. Rep. 7 (June 16, 1988), reconsideration granted on other grounds, 38 Ariz. Adv. Rep. 16 (July 11, 1989), and rejected the defendant's claim that he had a constitutional right to voir dire the trial judge. We have also previously held that a defendant must raise this issue at trial or it will be waived. State v. Rossi, 146 Ariz. 359, 369, 706 P.2d 371, 381 (1985). Here the the defendant failed to request voir dire of the trial court, and never expressly or impliedly alleged bias or prejudice. Therefore, he waived this issue.

CONSTITUTIONAL CHALLENGES[7]

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[7] We are aware of the decision of the United States Court of Appeals for the Ninth Circuit in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988), petition for cert. filed, Mar. 20, 1989, which holds that Arizona's death penalty statute is unconstitutional. The Ninth Circuit opinion invalidates our death penalty scheme on some of the same grounds the defendant raises here. We note that the grounds on which the Ninth Circuit rested its
(Footnote continued)

The defendant raises several arguments that the Arizona death penalty is unconstitutional. The defendant first argues that the statutory scheme for capital punishment is unconstitutionally vague because it fails to provide adequate standards for weighing aggravating and mitigating standards. We have previously considered this argument, and we reject it again. Rossi, 146 Ariz. at 366, 706 P.2d at 378. The defendant next contends that Arizona's death penalty statute is mandatory and therefore unconstitutional. As we have done before, we reject this argument. Id. Finally, the defendant asks us to reconsider the Arizona death penalty on the following five grounds: (1) the death penalty is cruel and unusual punishment; (2) it denies the defendant a right to a jury trial on the issue of sentencing; (3) it allows the prosecutor arbitrary discretion to seek the death penalty; (4) it places the burden of proving mitigating circumstances on the defendant; (5) it is arbitrarily, capriciously and freakishly imposed. There is nothing in the defendant's case causing us to reconsider the death penalty on any of these grounds. We have rejected them before and adhere to that view. Id.

PROPORTIONALITY REVIEW

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[7] (continued)
constitutional holdings are grounds on which different courts may reasonably hold differing views of what the Constitution requires. Until the United States Supreme Court instructs us that our interpretations are incorrect, we will continue to apply them.

After considering the defendant's claims of error, we make an independent review to determine whether the death penalty is excessive or disproportionate to the penalty imposed in similar cases. Richmond, 136 Ariz. at 321, 666 P.2d at 66. We compare the defendant and his crime to those cases where the death penalty was properly imposed because the crime was committed in a manner raising it above "the norm" of first degree murders, or the defendant's background places him above "the norm" of first degree murderers. State v. Blazak, 131 Ariz. 598, 604, 643 P.2d 694, 700, cert. denied, 459 U.S. 882, 103 S. Ct. 184, 74 L. Ed. 2d 149 (1982). We also compare the defendant and his crime to those cases where we have lessened the penalty imposed to life imprisonment. State v. McCall, 139 Ariz. 147, 162, 677 P.2d 920, 935 (1983), cert. denied, 467 U.S. 1220, 104 S. Ct. 2670, 81 L. Ed. 2d 375 (1984).

There are numerous instances where we have upheld the imposition of the death penalty when the murder was committed for pecuniary gain. State v. LaGrand, 152 Ariz. 483, 733 P.2d 1066, cert. denied, 484 U.S. 872, 108 S. Ct. 206, 98 L. Ed. 2d 157 (1987); State v. Harding, 141 Ariz. 492, 687 P.2d 1247 (1984); State v. Blazak, 131 Ariz. 598, 643 P.2d 694, cert. denied, 459 U.S. 882, 103 S. Ct. 184, 74 L. Ed. 2d 149 (1982); State v. Tison, 129 Ariz. 526, 633 P.2d 335 (1981), cert. denied, 459 U.S. 882, 103 S. Ct. 180, 74 L. Ed. 2d 147 (1982). We have also upheld the death penalty in cases where the defendant had prior

convictions punishable by life imprisonment. State v. Arnett, 158 Ariz. 15, 760 P.2d 1064 (1988); State v. Castaneda, 150 Ariz. 382, 724 P.2d 1 (1986); State v. Bracy, 145 Ariz. 520, 703 P.2d 464 (1985), cert. denied, 474 U.S. 1110, 106 S. Ct. 898, 88 L. Ed. 2d 932 (1986); State v. Harding, 141 Ariz. 492, 687 P.2d 1247 (1984).

In contrast, we have reduced a defendant's death penalty sentence to life imprisonment where we have found insufficient evidence to support the aggravating circumstances. State v. Johnson, 147 Ariz. 395, 710 P.2d 1050 (1985). We have also reduced the defendant's sentence where the defendant was mentally impaired, State v. Graham, 135 Ariz. 209, 660 P.2d 460 (1983), or very young when he committed the crime. State v. Valencia, 132 Ariz. 248, 645 P.2d 239 (1982).

Nothing in the present case leads us to consider that death is a disproportionate punishment. The defendant does not fall within any of the cases where we have reduced the death penalty to life imprisonment. We find nothing in the record otherwise making his sentence disproportionate. The defendant does, however, fall within those cases where the death sentence was properly imposed. Thus, the imposition of the death penalty is justified.

We have examined the record for fundamental error and find none. We affirm the judgment of conviction and the sentence.

William F. Holohan, Justice,
Retired

CONCURRING:

Frank X. Gordon, Jr., Chief
Justice

Stanley G. Feldman, Vice
Chief Justice

James Duke Cameron, Justice

James Moeller, Justice

(59)

Supreme Court

NOEL K. DESSAINT
CLERK OF COURT

STATE OF ARIZONA
201 WEST WING STATE CAPITOL
1700 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2888

TELEPHONE (602) 542-4536

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

April 18, 1990

RE: STATE OF ARIZONA vs. EDWARD HAROLD SCHAD, JR.
Supreme Court No. 4876-3 (CR-85-0246-AP)
Yavapai County No. 8752

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on April 17, 1990, in regard to the above-referenced cause:

ORDERED: Motion for Reconsideration = DENIED.

Justice Corcoran recused himself and did not participate in the determination of this matter.

Mandate to follow.

NOEL K. DESSAINT, Clerk

TO:
S. Alan Cook, Esq., S. Alan Cook, P.C.
Hon. Robert K. Corbin, Attorney General, ATTN: Jessica Gifford Funkhouser, Esq., and R. Wayne Ford, Esq.
Charles R. Hastings, Yavapai County Attorney
Edward Harold Schad, Jr., ASP, Post Office Box B-40496, Florence, AZ 85232
rs

the time. But this is a very serious case. And you do have an important obligation, an obligation that goes both ways, both to the defendant and to the State. And the State's interest in this case of course is to bring to justice the man who murdered Larry Grove.

I'm not going to make an emotional pitch, I don't think that's appropriate. You are here to make an objective decision, but don't lose sight of the fact this was a cold-blooded killing. You don't get much more cold-blooded than strangling the life out of a 74 year old man, a man you do not need to kill, and the motive as I told you in my opening statement at the beginning of this trial, the motive for this cold-blooded killing was greed, the car and money.

Justice needs to be done members of the jury, and on behalf of the people that I represent, the people of this community and of this state, I ask that you find Mr. Schad guilty of first degree murder.

[redacted] Ladies and gentlemen, I will now tell you the rules you must follow to decide this case. I will instruct you on the law. It is your duty to follow the law. I want to point out that I am going to give you one copy of these instructions to take into the jury room with you. So if you would give me your attention as I read them, you'll be able to refer to the instructions as you see fit in the jury room.

It is your duty to determine the facts. You must

determine the facts only from the evidence produced in court. You should not guess about any fact. You must not be influenced by sympathy or prejudice. You must not be concerned with any opinion you may feel that I have about the facts. You are the sole judges of the facts.

You must take into account all of my instructions on the law. You are not to pick out one instruction or part of one and disregard the others. However, after you have determined the facts you may find that some instructions do not apply. You must then consider the instructions that do apply together with the facts as you have determined them. Decide the case by applying the law in these instructions to the facts.

You must find the facts from the evidence. The evidence which you are to consider consists of testimony of witnesses and exhibits. At times I have decided whether testimony and exhibits should be admitted. When an objection to a lawyer's question was sustained you are to disregard that question and you are not to guess what the answer to the question might have been. When testimony was ordered stricken from the court record you are not to consider that testimony as evidence. Do not concern yourselves with the reasons for these decisions. Admission of evidence in court is governed by rules of law.

In the opening statements and in the closing

arguments, the lawyers have talked to you about the law and the evidence. What the lawyers said is not evidence but it may help you to understand the law and the evidence.

The lawyers are permitted to stipulate that certain facts exist. This means that both sides agree that those facts do exist.

You must decide the accuracy of each witness's testimony. Take into account such things as his ability and opportunity to observe, his memory, his manner while testifying, any motive or prejudices he might have, and any inconsistent statements he may have made. Consider his testimony in the light of all the evidence in the case.

If a witness has been convicted of a felony, that conviction does not necessarily mean that you cannot believe his testimony. A witness's conviction of a felony is one of the circumstances you may consider in determining whether to believe that witness.

The State has charged the defendant with the crime of murder. The charge is not evidence against the defendant. You must not think the defendant is guilty just because he has been charged with a crime. The defendant has pled not guilty. The defendant's plea of not guilty means that the State must prove every part of the charge beyond a reasonable doubt.

The law does not require a defendant to prove his innocence. He is presumed by law to be innocent. This means

the State must prove all of its case against the defendant. The State must prove the defendant guilty beyond a reasonable doubt.

The State must prove all of it's case against the defendant with evidence that the State itself gathers. Therefore the defendant is not required to testify. The decision on whether to testify is left to the defendant acting with the advice of his attorney. You must not conclude that the defendant is likely to be guilty because he does not testify. You must not discuss this fact or let it affect your deliberations in any way.

You must not consider any statements made by the defendant to law enforcement officers -- to a law enforcement officer unless you determine beyond a reasonable doubt that the defendant made the statements voluntarily. The defendant's statement is not voluntary whenever a law enforcement officer used any sort of violence or threats or any promise of immunity or benefit.

Evidence that the defendant may have committed crimes other than that charged is admitted only for a limited purpose. You may not consider such evidence as tending to show that the defendant has a disposition to commit crimes. You may however consider the evidence for other purposes, such as proof of motive, opportunity, intent or identity.

In deciding whether the defendant is guilty or not

guilty, do not consider the possible punishment.

Running away or hiding after a crime has been committed does not in itself prove guilt. You may consider any evidence of the defendant's running away or hiding together with all the other evidence.

The rules of evidence ordinarily do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of an expert witness. A person who by education, study and experience has become an expert in any art, science or profession may give his opinion as to any such matter. You should consider such expert opinion and should weigh the reasons if any given for it. However you are not bound by such an opinion. Give it the weight to which you deem it is entitled.

If you find that the plaintiff, the State of Arizona, has destroyed, caused to be destroyed or allowed to be destroyed any evidence whose contents or quality are in issue, you may infer that the true fact is against their interest.

Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events or to produce all objects or documents mentioned or suggested by the evidence.

Evidence may be either direct or circumstantial. It is direct evidence if it proves a fact without an inference and

which in itself if true conclusively establishes that fact. It is circumstantial evidence if it proves a fact from which an inference of the existence of any other fact may be drawn. An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence. Under the law circumstantial evidence is just as worthy as direct evidence, provided it satisfies the mind beyond a reasonable doubt of the material facts sought to be proved.

Murder is the unlawful killing of a human being with malice. The thing that distinguishes murder from all other killings is malice. There are two kinds of malice. A person has one kind of malice when he deliberately intends to kill. If you determine that the defendant used a deadly weapon in the killing, you may find malice. If you determine that the defendant has no considerable provocation for the killing you may find malice. There is also a second kind of malice. A person has this kind of malice if he shows a reckless disregard for human life.

Once you have determined that there is malice, you must determine if the murder was in the first or second degree. First degree murder is murder which is the result of premeditation. Premeditation means deciding in the mind beforehand. It does not matter how quickly or slowly the decision to kill is followed by the act of killing.

Murder which is committed in the attempt to commit robbery is also first degree murder.

All other kinds of murder are second degree.

If you have a reasonable doubt about which of the two degrees of murder was committed, you must decide it was second degree murder.

Robbery is the wrongful taking of the personal property in the possession of another from his person or immediate presence and against his will accomplished by means of force or fear.

The crime of first degree murder includes the less serious crime of second degree murder. The State may prove second degree murder but fail to prove the more serious crime of first degree murder. You are permitted to find the defendant guilty of the less serious crime of second degree murder, one, if the evidence does not show beyond a reasonable doubt that the defendant is guilty of first degree murder. Two, if the evidence does show beyond a reasonable doubt that the defendant is guilty of second degree murder.

In the case of certain crimes it is necessary that the criminal act be accompanied by a specific or a particular intent without which the crime is not committed. Thus in the crime of robbery, a necessary fact to be proved is the existence in the mind of the defendant of the specific intent to wrongfully take the personal property in the possession of

another from his person or immediate presence and against his will, and unless such intent to do so exists that crime is not committed.

Force means any physical act directed against a person as a means of gaining control of property.

All 12 of you must agree on a verdict. All 12 of you must agree whether the verdict is guilty or not guilty.

When you go into the jury room you will choose a foreman who will be in charge during your deliberations and who will sign any verdict. You may come to one of three verdicts. You may return a verdict of guilty of murder in the first degree. You may return a verdict of guilty of murder in the second degree. You may return a verdict of not guilty.

You will be given three forms of verdict on which to indicate your decision. They read as follows. They are in no particular order.

Omitting the caption, they go as follows: We the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find the defendant, Edward Harold Schad, Jr., guilty of first degree murder.

We the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find the defendant, Edward Harold Schad, Jr., guilty of second degree murder.

We the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find the defendant, Edward

RETURN OF VERDICT

THE COURT: The record will reflect the presence of the defendant, counsel and the jury.

We have received a note at about 7:15 which simply said "We are close to a verdict." I'll just ask the clerk to file that note.

Your foreman is Mr. Henscheid, is that correct?

THE FOREMAN: Yes.

THE COURT: Mr. Foreman, Mr. Henscheid, have you reached a verdict?

THE FOREMAN: Yes, Your Honor, we have.

THE COURT: Please hand the verdict forms to the bailiff.

The clerk will please read and record the verdict, omitting the formal caption.

THE CLERK: "We the jury, duly empaneled and sworn in the above entitled action, upon our oaths, do find the defendant, Edward Harold Schad, Jr., guilty of first degree murder."

THE COURT: Ladies and gentlemen of the jury, is this your true and correct verdict?

JURORS: Yes, Your Honor.

THE COURT: Do counsel wish to have the jury polled?

MR. DAWLEY: I don't, Your Honor.

MR. SHAW: Yes, Your Honor, I do.

DAVID W LUNDY/COURT REPORTER

Appendix D

FILED
7:45 O'CLOCK, A M
[AUG 29 1985]
BARBARA BOYLE, Clerk
By Deputy
[Barbara Boyle]

SUPERIOR COURT OF ARIZONA
YAVAPAI COUNTY
PRESCOTT, AZ

1	August 29, 1985	RICHARD ANDERSON	Virginia F. Goldsmith
Div	Date	Judge or Commissioner	Deputy

NO. 8752

STATE OF ARIZONA
VS
EDWARD HAROLD SCHAD, JR.

County Attorney
By: Frank Dawley

Charles Anthony Shaw
Defense Counsel

DATE OF BIRTH: 7-27-42

SENTENCE OF IMPRISONMENT

_____ a.m./p.m. The State is represented by the above named Deputy County Attorney; the Defendant is present with above named counsel.

Court Reporter David W. Lundy is present.

The Defendant is advised of the charge, the determination of guilt and is given the opportunity to speak.

Pursuant to A.R.S. Section 13-607, the Court finds as follows:

[ ] **WAIVER OF COUNSEL** The Defendant knowingly, intelligently, and voluntarily waived his right to be represented by counsel after being advised of the right to be represented by counsel including the right to have counsel appointed free of charge if the Defendant is indigent.

[ ] **WAIVER OF JURY TRIAL** The Defendant knowingly, intelligently, and voluntarily waived his right to a trial by jury after having been advised of his right to same. The determination of guilt was based upon a trial to the Court.

[ ] **WAIVER OF TRIAL** The Defendant knowingly, intelligently, and voluntarily waived his right to a trial with or without a jury, his right to confront and cross examine witnesses, his right to testify or remain silent and his right to present evidence and call his own witnesses after having been advised of these rights. The determination of guilt was based upon a plea of guilty/no contest.

[X] **JURY VERDICT** The determination of guilt was based upon a verdict of guilty after a jury trial.

(Continued)

Appendix E

1 | August 29, 1985 | RICHARD ANDERSON | V. Goldsmith
Div | Date | Judge or Commissioner | Deputy

No. 8752

STATE VS. EDWARD HAROLD SCHAD, JR.

Having found no legal cause to delay rendition of judgment and pronouncement of sentence, the Court enters the following judgment and sentence:

IT IS THE JUDGMENT of the Court that the Defendant is guilty of the following crime( ), that upon due consideration of all the facts, law and circumstances relevant here, the Court finds that suspension of sentence and a term of probation are not appropriate and that a sentence of imprisonment with the Department of Corrections is not appropriate.

THE COURT FURTHER FINDS that there are circumstances sufficiently substantial to call for a Presumptive or Aggravated or Mitigated sentence as indicated on the following pages. These circumstances are stated by the Court on the record.

AS PUNISHMENT, IT IS ORDERED that the Defendant is sentenced to Death, and is committed to the Arizona Department of Corrections as follows:

Therefore, it is the Judgment and Sentence of this Court that the Defendant, Edward Harold Schad, Jr., be sentenced to death inflicted by the administration of lethal gas. The execution shall take place at the Arizona State Prison at a time to be fixed by the Arizona Supreme Court if this conviction and sentence are affirmed.

(Continued)

Superior Court of Arizona
Yavapai County

FILED
3:45 O'CLOCK, P M
DEC 14 1978
BARBARA BOYLE, Clerk
By Katherine Wilkes
Deputy

STATE OF ARIZONA,

Plaintiff,

vs

EDWARD HAROLD SCHAD

Defendant(s).

Superior Court No. 8752

Grand Jury No. 12 -GJ- 751

INDICTMENT

(FELONY) [redacted]

The grand jurors of Yavapai County, Arizona, accuse

Edward Harold Schad

charging that in _____, Prescott

Precinct, Yavapai County, State of Arizona:

On or about August 1, 1978 EDWARD HAROLD SCHAD murdered Lorimer Leroy Grove, all in violation of A.R.S. §§13-451, 13-452, as amended and 13-453 A, as amended.

BILLY L. HICKS
[redacted]
Yavapai County Attorney

By _____
Deputy County Attorney

December 14, 1978
Dated

A True Bill
(Foreman writes "A True Bill")

Lawrence L. Lakenmacher
Foreman of the Grand Jury

Form XIII (9-73)

Exhibit A
Page 1 of 1 Pages Appendix F

finished. You'll get a copy to take with you to the jury room, so I'm not going to read them to you now just to repeat them for you.

Let's talk about the specifics of this case. If you look at the easel, members of the jury, I have drawn up the elements, or the components parts, of first degree murder. There are two types of first degree murder, two ways for first degree murder to be committed. On the left is premeditated murder. There are three elements to that. One, that a killing take place, that the defendant caused someone's death. Secondly, that he do so with malice, And malice simply means that he intended to kill or that he was very reckless in disregarding the life of the person he killed.

And you will also be instructed that if the defendant used a deadly weapon, as he did in this case, the ligature, that you may find the intent to kill from the use of that deadly weapon.

And along with the killing and the malice, attached to that killing is a third element, that of premeditation, which simply means that the defendant contemplated that he would cause death, he reflected upon that.

The other type of first degree murder, members of the jury, is what we call felony murder. It only has two components parts. One, that a death be caused, and, two, that that death be caused in the course of a felony, in this case a

robbery. And so if you find that the defendant committed a robbery and killed in the process of that robbery, that also is first degree murder.

If you'll look at the easel toward the lower left-hand corner there, members of the jury, I have put the word second degree and then under that no premed.

All that means to say is the difference between premeditated first degree murder and second degree murder is that the first two elements, a killing with malice, do apply but if there's no premeditation then it's second degree murder.

You'll be given three forms of verdict in this case, guilty of first degree murder, guilty of second degree murder, or not guilty.

If you find either a premeditated murder or a felony murder, then you will find the defendant guilty of first degree murder.

In this case, both types of first degree murder apply.

Exhibit 31 is the autopsy photograph that was identified by Dr. Keen. It's not a very pleasant photograph but it's black and white and it's not all that gruesome and it was offered for a very specific purpose, not to excite you or get you emotional but to show you the rope, to show you the weapon and where it was located.

And from the body of Mr. Grove we know a lot about

similar at all, they were completely different.

What about the statements of Ed Schad? What do they show? We have statements of Ed to a trooper in New York to, to Detective Johnson in Salt Lake City, that he was delivering this Cadillac for an elderly person. In one case he was delivering it to somebody in New York, I forget who the other guy said, maybe they were both -- well, yeah, one was Bridgeport, New York, the other was New York City, which he had been.

Ed Schad, I'm not going to stand up and say that he is without any blemish at all. He was in control of somebody else's car. I think he knew that. He was in control of somebody else's credit card. I think he knew that; he was forging it. He was a thief at that time, but he was not -- that does not mean, does it, that he was a murderer? This is a common statement, is it not? Consider it. If you are in somebody else's car, what's the normal explanation you are going to give if you want to give an explanation as to why you have got that car? That you are delivering it for somebody and that you are delivering it for an elderly person, because it's an elderly person you would think who doesn't like to drive. So you are delivering it for him. That's the explanation for that statement.

Now, Mr. Dawley said he made a statement regarding a trade to Wilma in Columbus, Ohio. Wilma didn't say that. That